# Self-regulation, Co-regulation, State Regulation

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# The Internet between Regulation and Governance

***Fresh Thinking and the Internet.*** Government actors in many countries attempted to react to the Internet using conventional means of the state apparatus, like passing laws in parliament or having courts judge over access to unlawful content. In most cases this proved to be fruitless; in fact it demonstrated the weakness of the traditional nation-state in attempts to regulate the Internet. Just to give a few examples: since 1997 there has been a law on digital signature (the oldest in the world) in Germany, but after seven years there is still no practical way to sign a contract on the Net. In several countries, courts have attempted to punish Internet service providers (ISPs), which allowed access to hate speech or child pornography for example, usually without any success. True, there are governments like Singapore or China that censor content on the Net, but the effect is limited as the fluidity of the Net often means that filtering programs can be circumvented.

This paper is about the obvious weakness of the traditional nation-state and its instruments *vis-à-vis* the Internet and new ways of coping with the problem. It is often the State itself that encourages unconventional action as this releases it from difficulties in fulfilling its obligations. A Council of Europe Recommendation of 5 September 2001 encourages self-regulatory organizations, especially in the field of media regulation. Innovative concepts of regulation and governance are being tested and decision-making procedures

in a global environment are being addressed. This requires new ways of thinking:

- Firstly, it is necessary to assess existing concepts of regulation and governance (from pre-Internet times) and consider how they may be applied in the Internet age.
- Secondly, recent and encouraging developments can be observed that might lead to a new era of global Internet governance.
- Finally, ten rules of Good Internet Governance will be proposed that define trends and values for the emerging structure of global Internet regulation.

***State Regulation and Self-regulation.*** Regulation in the original sense refers to an arbitrary process under the rule of the State, usually centred in a (more or less) independent regulatory body. This body makes decisions in situations where there are conflicting interests. The idea is that decision-making is so complex that a specialized body of independent experts is better equipped to do this than state bureaucrats. The term "regulation" is already mentioned in the US Constitution, dating back to the late eighteenth century. Regulatory bodies are also not new. The first "watchdog agencies" were established in the US in the second half of the nineteenth century for the private railroad industry.

One field that is regulated by the State is broadcasting. More precisely, this means that the State issues radio and television licences and supervises the industry. Again this first emerged in the US in the 1930s (FCC 1934) in the context of commercial broadcasting. Europe did not experiment with regulatory bodies until the 1980s. Today examples of these are Ofcom that was recently established in Britain, the Conseil Supérieur de l'Audiovisuel Français in France or equivalent

bodies in the German *Länder* or States. Bodies of this type are usually constructed like a court, with collective decision-making somehow reflecting the work of a "jury". They have to handle applications from different interests and may also adjudicate between the interests of the broadcasting industry and the public. Their main task is to hammer out a lasting compromise, not to decide what is legal or unlawful. One obvious problem is that these authorities are potentially weak and vulnerable to being "taken over" by the industries that (mis)use them for their own interests, for example to keep newcomers away from the market or to increase tariffs (e.g. for cable fees).

This traditional version of regulation contains – especially in the European perspective – "the idea of control by a superior; it has a directive function"[1]. As matters of broadcasting regulation tend to be very complex, these bodies are soon overloaded with work and usually encourage self-regulation of the industry. This means that the actors are urged to solve problems among themselves, before turning to the state regulator. As it usually reflects the interests of the industry to keep the State out of its affairs, it accepts this obligation. Therefore state regulation is usually accompanied by self-regulation. This type of self-regulation is done under the "shadow of the State", meaning that all sides act under the threat that the State may intervene if no compromise is found or public interests are seriously threatened.

If the State and the private regulators co-operate in joint institutions, this is called "co-regulation". If this type of self-regulation is structured by the State but the State is not involved the appropriate term is "regulated self-regulation"[2]. This type of regulation was first developed in Australia.

1 A. Ogus, *Regulation. Legal Form and Economic Theory* (Oxford: Calderon Press, 1994), 2.

2 Wolfgang Hoffmann-Riem, *Modernisierung in Recht und Kultur* (Frankfurt: Suhrkamp, 2001).

But self-regulation may also be found where there is no state regulation. One might say that self-regulation looks back over a long tradition, especially in environments where no state authority was available. It was quite well developed in early networks of long-distance traders, e.g. in the Mediterranean region (Lex Mercatoria, eleventh century) or in the Hanseatic League, covering the North and Baltic Seas.[3]

Modern self-regulation again started in the US with industry associations that defined their own code of conduct. And only those who adhered to these self-defined moral rules were entitled to become members. Whoever did not follow the rules voluntarily, could not be formally punished, but there were sanctions like being excluded from the association and/or making public the accusations. The first organizations that followed these procedures were associations of newspaper publishers and editors in the 1920s.

The best known fields for this type of self-regulation in Europe are the press councils that may be found in a majority of EU member countries today.[4] The press council movement started in the 1950s in Britain and later in Germany. The first step was usually taken by the State, which planned to intervene in the matters of the industry with a law. The press industry retaliated by offering to build an autonomous structure for complaints that would be handled before independent bodies, constituted and financed by them. Decisions are made based on a Code of Ethics for Journalists that is then applied to individual complaints. In a similar way to a court, the case is considered by a jury. However, this jury consists of representatives from the industry, possibly of active journalists and media professionals and perhaps also laypeople. They consider the case together and issue a ruling that is made public. If a publication is being criticized, it is expected to publish the criticism, but it cannot be sanctioned if it does not.

The advantage of this type of self-regulation is that representatives from the profession and not regular judges pass judgement on complicated matters of journalistic reporting and decide what is acceptable and what crosses the borderlines. This adheres to the idea of a peer review. Most European countries have press councils although these differ very much in the way they work. Even though press councils usually date back to pre-Internet times, they have extended their activities and are today responsible for online publications as long as they are of a journalistic nature. There are other fields of pre-Internet self-regulation, the most prominent being the classification of films and movies, which is mandatory in most European States.[5]

Both variations of regulation – by the State and by the industry itself – are highly relevant for the development of Internet regulations. Practically all European regulatory bodies in broadcasting started with a limited range of activities. But with the convergence of broadcasting, telecommunications and information technology, they have to widen their regulatory responsibilities or merge with institutions that regulate telecommunications. The American Federal Communications Commission (FCC) has covered all communication sectors since it was founded in 1934 (www.fcc.gov). As a result it only had to co-ordinate and merge its internal handlings. In Britain, Ofcom was established in 2004 incorporating the work of five former agencies that had been performed independently before (www.ofcom.gov.uk). In other countries, like Germany,

3 Michael Latzer et al., *Selbst- und Ko-Regulierung im Mediamatiksektor. Alternative Regulierungsformen zwischen Staat und Markt* (Wiesbaden: Westdeuscher Verlag, 2002), 9.

4 Danilo A. Leornardi, *Self-Regulation and the Print Media: Codes and Analysis of Codes in Use by Press Councils in Countries of the EU*, 2004.

5 Oxford University, Programme on Comparative Media Law and Policy, *Self-Regulation of Digital Media Converging on the Internet: Industry Codes of Conduct in Sectoral Analysis* (Oxford, 30 April 2004), 57–60.

the convergence of regulatory structures has not even started. It remains to be seen to what extent the logic of "old" regulatory action will be able to cope with the Internet.

A new field of industry self-regulation has emerged in relation to the Internet. This is based on codes of practice that regulate issues like respect for privacy, public decency, protection of minors, accuracy or the application of filtering software. An important part is played here by Internet service providers (ISPs) and their respective industry associations. A recent study identified self-regulatory activities in most EU countries although there were considerable differences between them. The study comes to the general conclusion that the "most successful self-regulatory activity has taken place where there is a key legal basis; e.g. in relation to complaints about illegal content."[6] Regulation was less successful when public policy objectives are not clear or consensus is difficult to build. Often the codes of practice are little known and insufficient transparency and accountability in the process of code production and application were mentioned. Other fields of self-regulation of the Internet and digital media include Internet content, the electronic game industry and mobile Internet services.[7]

The distinctive feature of these regulations is that they were removed from traditional state bureaucracy, which was unable to handle the details of Internet communication. Problems arise when bodies are "captured" by private interests. Regulation and self-regulation in Europe reflect the thinking of a corporate age in which co-operation between industry and professional associations, rather than the State, is seen as a move away from "big government".

These "old" procedures of regulation were devised at a time when citizens and the civil society were not yet seen as autonomous actors with independent competence and exper-

tise. Therefore in these regulatory schemes there is no room for the participation of the "public", or representatives of non-governmental organizations (NGOs) and citizen action groups. As a consequence, regulation was left to the experts, mostly in the industry but sometimes in co-operation with professional organizations. Laypeople are rarely involved. The one exception is the traditional idea of the "ombudsman", a well-accepted person who represents the interests of "ordinary" people. The lack of citizens' representation certainly has to do with the fact that the civil society was not involved in the "old" media, so no need was felt to include citizens or their associations in the regulatory process.

The concept of governance is more recent and reflects the fact that over the past decades civil society organizations were increasingly voicing their concerns about many issues (including environment, gender, unemployment etc.). This certainly affects new forms of communication and the Internet.

***Governance.*** Even before the "discovery" of governance it had become a common insight that conventional political decision-making is no longer appropriate to solve many of the complex challenges. It might be more effective to have decision-making organized in policy networks – informal structures of different actors with mixed public and private backgrounds. In EU schemes the search was for a "third way" between supra-nationalism and intergovernmentalism and the solution was seen in forms of self-regulation as well as European "multi-

6 Oxford University, Programme on Comparative Media Law and Policy, *Internet Self-Regulation: An Overview*, 2004 <www.selfregulation.info/iapcoda/03029-selfreg-global-report.htm>, 2.

7 Oxford University, Programme on Comparative Media Law and Policy, *Self-Regulation of Digital Media Converging on the Internet: Industry Codes of Conduct in Sectoral Analysis* (Oxford, 30 April 2004), 37–57, 61–70.

level" governance.[8] Other spectators saw the need for "self-organizing, interorganizational networks" that they called governance.[9]

Governance was first developed in the 1980s as a concept to introduce good behaviour in companies, with the intention to improve relations with the public and make decisions more transparent.[10] The term was then introduced in the analysis of international relations, reflecting the fact that in the absence of global government, successful decision-making becomes a highly complex procedure between national governments, global organizations like the UN, economic actors and NGOs.[11] Civil society representatives were closely involved in global UN Conferences on Environment, Women, Health etc., which started in the early 1990s. These conferences can therefore be seen as good examples of emerging governance. Certainly the two-stage World Summit on the Information Society (WSIS), with its first meeting in Geneva (2003) and the final conference in Tunis (2005), follows this tradition and serves as a good example of Internet governance.

Modern governance has different meanings. A rather general definition describes it as government that interacts with society, applying interactions "with a 'co'-public-private character, offset against a 'do-it-alone' government perspective".[12] According to the Dutch scholar Jan Koosman, governance describes a mix of all kinds of social responses to changing government demands, based on the idea that governance is made up of both public and private "governors". In contrast to concepts of self-regulation, which were primarily developed in law and reflect legal thinking, governance is a "socio-political" term and is based predominantly on social and political science analysis. A crucial aspect is the idea that political decision-making should go beyond the strict boundaries of state appa-

ratus and should seek to involve interested and competent partners in the economy and civil society. It is especially the inclusion of the civil society and its representatives, old associations and new non-governmental groups, allowing new forms of public interest advocacy, that is typical for concepts of governance.

The logic of governance existed before the Internet and has been successfully practised in various situations. One might recall the "round tables" at the time of the transformation of politics in many former communist countries. Representatives from all layers of politics, economics and society, including former Communists and members of the opposition, sat together to find viable solutions. Including representatives of all "socially relevant groups" on the broadcasting boards of public service radio and television stations in Germany, as has been the practice since the late 1940s, also points in this direction.

Whereas self-regulation works best under the "shadow of the State", which provides a "safety net" if self-regulation fails, governance calls for collaboration with the State. Governance makes the decisions instead of the State and expects the State to respect these. Of course, governance is a concept that is in an experimental phase and still has to prove its usefulness in a global context.

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8 Michael Latzer et al., *Selbst- und Ko-Regulierung im Mediamatiksektor. Alternative Regulierungsformen zwischen Staat und Markt* (Wiesbaden: Westdeuscher Verlag, 2002), 35.

9 R.A.W. Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (Buckingham/Philadelphia: Open University Press, 1997), 46.

10 Arthur Benz, "Governance- Modebegriff oder nützliches sozialwissenschaftliches Konzept?", in Benz (ed.), *Governance - Regieren in komplexen Regelsystemen. Eine Einführung* (Wiesbaden: Westdeutscher Verlag, 2004), 12–28.

11 Maria Behrens, "Global Governance", in Benz (ed.), *Governance - Regieren in komplexen Regelsystemen. Eine Einführung* (Wiesbaden: Westdeutscher Verlag, 2004), 104–24.

12 Jan Koosman, *Governing as Governance* (London: Sage, 2003), 3.

***Beginnings of Global Internet Governance.*** In order to cope with global issues relating to the Internet, including the future of the Internet Corporation of Assigned Names and Numbers (ICANN), the World Summit on the Information Society (WSIS) in Geneva in December 2003 called for action. On 11 November 2004 the Secretary General of the United Nations Kofi Annan announced the establishment of a new Working Group on Internet Governance (WGIG). Some of its obligations are:

- to define Internet governance;
- to identify public policy issues that are relevant to Internet governance;
- to develop a common understanding of the respective roles and responsibilities of governments, international organizations and other forums, as well as the private sector and civil society from both developing and developed countries.[13]

The 40-member Working Group is chaired by Nitin Desai, Special Adviser to Annan for the WSIS. The Swiss diplomat Markus Kummer was appointed Executive Coordinator of the WGIG's Secretariat. The UN emphasized that it will provide for an "open and inclusive" process and "a mechanism for the full and active participation of governments, the private sector and civil society from both developing and developed countries, involving relevant intergovernmental and international organizations and forums."[14] The members of the first, governmental bank consist of representatives of national governments, usually from the Telecommunications Ministries (in the case of the European Commission the Information Society Director-General). A second bank, mainly of economists, includes personalities from different industrial sectors and their trade associations. Activists from the civil society side showed satisfaction that nine of their ten proposals had been accepted.

Karen Banks, Director of the London-based organization GreenNet, Association for Progressive Communications, is one of the members of this third bank. Another representative is Wolfgang Kleinwächter, Professor for International Communication Policy and Regulation at Aarhus University. It seems that because of the plurality and diversity of competence the WGIG is well prepared to do its job. The same applies to the regional distribution of the members, which – projected on the globe – would look like a graphic version of a "policy network" that includes all major spaces of the world.

The WGIG is expected to submit its report to the Secretary General by July 2005. Issues that should be addressed include the management of Internet resources, network security, cybercrime, spam and multilingualism.[15]

The WGIG is so far the most striking example of the incorporation of governance structures into the future of the Internet. On the other hand, the Working Group does not follow all the principles of fully fledged governance that have been devised in academic research. For example, the members have been appointed, the body is not self-organizing and it may only supply proposals instead of making binding decisions. In spite of this it may serve as a role model for the establishment of future regulatory bodies on Internet issues.

***Thinking about the Future of Internet Governance.*** The introduction of the Internet – in complete contrast to earlier technologies of communication – was accompanied by procedures and patterns of behaviour that have evolved among users of the Internet. This could very well be described as practical self-regulation. "Netiquette" was the first informal code of conduct

13 UN Press Release, "United Nations establishes Working Group on Internet Governance", 2004 <www.un.org/News/Press/docs/2004/pi1620.doc.htm>

14 and 15 Ibid.

that was not developed by industry representatives but users who wanted to utilize the Net for themselves in a civilized way. This logic should be extended and made popular among all Net users. It should also serve as a blueprint for other forms of regulation.

It has become clear that coping with the Internet requires innovative and new ways of thinking. The conventional law-making process centred around a nation-state, its lawmaker, bureaucracy and court system proved unsuccessful in most cases. There are two reasons for this: firstly laws cannot regulate the Internet in many cases, and secondly the Internet as a global medium cannot be caged in by nation-states. Instead new concepts are required and, as Lawrence Lessig demands, "code instead of laws" are needed.

Regulation of the Internet is complicated and should be limited to fields where it is unavoidable. Preferably the Web should be seen as a space that works best autonomously and without any intervention. If regulation appears unavoidable though, it should be applied according to the principle of subsidiarity, meaning that regulation should be as close to the source of trouble as possible – close both in terms of geography and competence. Regulated self-regulation is here a preferable option to a regulatory authority. The best model though is that of governance as it includes all relevant stakeholders.

Successful regulation of the Internet requires a high level of competence and expertise. The knowledge of how it can best be achieved is distributed across different segments of society and includes representatives of governments, industry, the users themselves and citizen action groups. Without their joint involvement, no regulation of the Internet will ever be successful. When structures or institutions for Internet regulation are being designed they should follow the multi-stake-

holder approach of governance that includes "governors" from different segments of society, geographical regions and genders etc. No sector should be allowed to dominate and the overall strategy should be based on compromise.

A crucial element of governance procedures is transparency, both in the selection of "governors" and in conducting its day-to-day work. The emphasis on transparency follows the principle that any regulatory action should be proposed, openly and widely disputed and finally executed in public, with an openness that clearly expresses responsibilities for decisions. At the same time transparency reduces mistrust against those who are in charge. A perfect means for achieving this transparency is the Net itself. For example, meetings of the regulators should be held in public and be made available worldwide via video stream. The Net should be utilized to collect proposals and statements from interested users. Negotiations should be accompanied by Net-based mediation and presentation. The results of regulatory work should be made available on the Net.

An important element of governance is trust and legitimacy. Governments receive legitimacy through general elections and parliamentary action. Participants in governance processes have to bridge a trust gap. Until now members of governance bodies have been appointed, which means that there is little legitimacy. But self-organization and the selection of representatives by the respective constituencies and stakeholders are certainly possible. The best way is to base their legitimacy on new Net-based votes, including Net-based elections of representatives and referenda or opinion polls about options proposed by the regulators. Thinking through the concept of governance to take it one step further, one could combine the WGIG logic with that of other Internet experiences.

ICANN is at present a company that cannot act independently from the Commerce Department of the US Government.[16] Network administration by ICANN could in the future follow the self-regulatory logic of global governance, i.e. as an international corporation under UN authority with a board of globally selected governors. These governors could be elected in different world regions in Internet-based elections of a kind that have already been practised by ICANN. During the ICANN elections of 2000 it was demonstrated that votes are possible outside the structure of the nation-state and this should be used as a role model.[17] As a result ICANN could be a very good starting point for establishing a role model for an international Internet regime that follows the logic of governance.

Freedom, diversity and pluralism must be predominant values in the work of governance bodies. Freedom primarily refers to the rules of freedom of expression and information as stated in democratic constitutions and international conventions on human rights. But it also applies to the interaction between the States and their citizens. Government bodies should only intervene in matters of the Internet if this is unavoidable and there is no other possible solution. Censorship, filtering and other repressive measures should not be tolerated. But the Internet is not just threatened by state activities, it also faces the danger of "privatized governance". This occurs when a few industrial actors become so powerful that they are able to take over the regulatory process and define the rules. Diversity and pluralism as values do not just refer to the content of the Internet, they are also values of utmost importance in the selection of regulators. Global public policy should become a champion defending these values. Part of the working mechanisms of Internet governance bodies could be complaint procedures. Those who feel threatened by any kind

of restrictions on their freedom could appeal to the body that could act as a form of jury and decide how to proceed.

A cautious form of regulation and governance cannot, of course, solve all problems posed by the Internet. It is based on technical designs that are mostly decided upon by hardware and software companies, not bodies of government or governance. The technical architecture of the Web must reflect values like openness, competition and easy access. It must be a central task of regulatory action to protect these features and to develop the courage to counteract any trends that could lead to the monopolization of Internet activities. As the freedom of the Internet will not happen automatically and there will always be the danger of deterioration, a competent and knowledgeable global network of "governors", following the logic of governance, that keeps careful watch is probably the best guarantee for a promising future.

16 Monika Ermert, "ICANN, WSIS und die Selbständigkeit der Internet-Verwaltung", *Heise-Online-Newsticker*, 20 July 2004 <www. heise.de/newsticker/meldung/49236>

17 Ingrid Hamm and Marcel Machill (eds.), *Wer regiert das Internet? ICANN als Fallbeispiel für Global Internet Governance* (Gütersloh: Verlag Bertelsmann Stiftung, 2001).

Christopher T. Marsden

# Co- and Self-regulation in European Media and Internet Sectors: The Results of Oxford University's Study www.selfregulation.info*

## 1. Introduction: Co-regulation of the Media in Europe

PCMLP (Programme on Comparative Media Law and Policy) recently completed a two-and-a-half year empirical investigation into regulatory change with its final report for DG Information Society, the IAPCODE (Internet Action Plan Codes of Conduct) study of May 2004.[1] This article outlines the main findings and research questions answered and explored by the report. PCMLP adopted an overtly empirical and applied methodology to the IAPCODE project, recognizing that co- and self-regulation result from institutional settlements and negotiations between various stakeholders (corporate, government and viewers/consumers). By tunnelling down from legislation and regulation into self-regulatory codes of conduct voluntarily agreed by industry, and supervised by user groups and regulators, PCMLP was able to build a substantial capacity for analysis of such codes, and therefore the real commitments agreed to by actors. After the policy debates, and consequent concrete codes agreed to, PCMLP recognized a vital further empirical investigative stage – into codes in action, the

* This article is based on the executive summary of the final report delivered to the Directorate General Information Society of the European Commission, in May 2004. My thanks to Damian Tambini, Danilo Leonardi and Marcus Alexander at Oxford, and Richard Swetenham at the Commission, for help and advice. All errors and omissions remain my own.

real enforcement behaviour of self-regulated actors. It was here, in the development of the practice and culture of compliance with voluntary self-regulation by actors, that the real differences between shades of regulation were seen. Over the period from 2002 to 2004, across media sectors and national borders, the PCMLP investigation uncovered huge variety in regulatory effectiveness and real-life examples of regulation that varied from more-or-less state-sanctioned and required regulation, which was closer to command-and-control than even co-regulation, across varieties of co-regulation, to an almost pure form of self-regulation.

Legal and regulatory certainty is a prerequisite for a vibrant, innovative and economically strong EU multimedia industry.[2] Effective content regulation is necessary to protect the public interest in cultural and linguistic diversity, rights to information, minors, human dignity and, in areas like advertising and telesales, to protect consumers. The European Commission recognizes that co-regulation can be used as a means to implement objectives set by directives and has outlined in the White Paper on European Governance[3] a set of conditions under which it will consider the use of co-regulation. Co-regulation is a pragmatic response to the common perception that regulatory frameworks must quickly adapt and continually be optimized

1 See Decision No. 276/1999/EC of the European Parliament and of the Council of 25 January 1999 adopting a Multiannual Community Action Plan on promoting safer use of the Internet and new online technologies by combating illegal and harmful content primarily in the area of the protection of children and minors OJ L 33, 6.2.1999, p.1 as amended by Decision No. 1151/2003/EC of the European Parliament and of the Council of 16 June 2003 OJ L 162, 1.7.2003.

2 See L. Woods and A. Scheuer, (2004) "Advertising Frequency and the Television Without Frontiers Directive", 29(3) *European Law Review* at 366–384, analysing in particular Case C-245/01 *RTL Television GmbH v. Niedersächsische Landesmedienanstalt für privaten Rundfunk*, judgment 23 October 2003, nyr (see http://curia.eu.int). See further in context, L. Woods, *Free Movement of Goods and Services* (Ashgate Publishing, 2004).

3 Com (2001) 428 Final, European Governance – A White Paper, at p. 21, see <http://europa.eu.int/eurlex/en/com/cnc/2001/com2001_0428en01.pdf>

to maintain relevance and effectiveness in rapidly evolving markets. This is particularly evident in the media sector which is generally regarded as the engine for creating and exploiting content.

European debate[4] led to a co-regulatory Recommendation in 1998 that continues to serve as the Commission's policy towards content regulation.[5] Further Commission legal instruments, including the E-Commerce Directive of 2000, have maintained the co-regulatory approach to new media regulation laid out in the 1998 Recommendation.[6] The European Commission expresses some of the pitfalls of new media consumption compared with traditional means: "Whereas in traditional broadcasting (analogue or digital) the individual broadcaster is easily identifiable, it is difficult and sometimes impossible to identify the source of content on the Internet. Access to harmful and illegal content is easy and can even occur without intent. In addition, the volume of information in the Internet is massive in comparison to broadcasting."[7] End-user tools such as filtering or the famous "V-chip", imposing rules on children's use of computer games and the World Wide Web, and reporting inappropriate or illegal content to hotlines established by Internet companies have had only limited success.

There are markets for regional and/or national television, radio, newspapers, telecoms, satellite and cable pay TV, all recognized in case law.[8] The use of data compression and increases in cost-effective bandwidth such as Digital Subscriber Lines (DSL) allow more and better point-to-point delivery.[9] In this environment flexibility of regulatory frameworks will be of paramount importance to ensure that regulators meet the current and future needs of the marketplace and maintain the confidence of consumers through the protection of public interests. Commission consultations have

shown that a wide range of co-regulatory and self-regulatory approaches have been used within the Member States, particularly in areas such as advertising and protection of minors. However, such is the dynamic development of the sector and its regulatory landscape, that there remains insufficient clarity as to the nature of the co-regulatory/self-regulatory approaches taken, the areas within the media sector where they are applied, their consistency with public interest objectives, their impact on fragmentation of the single market and ultimately, their effectiveness in achieving the intended regulatory objectives.

4 See European Commission (1996) Green Paper on the protection of minors and human dignity in audiovisual and information services on 16 October 1996; Council resolution on illegal and harmful content on the Internet of 17 February 1997 OJ C 70, 6.3.1997; Economic and Social Committee Opinion OJ C 214, 10.7.1998; European Parliament Opinion OJ C 339, 10.11.1997; Economic and Social Committee Opinion OJ C 287, 22.9.1997; Committee of the Regions Opinion OJ C 215, 16.7.1997.

5 Green Paper on the protection of minors and human dignity in audiovisual and information services, COM (96) 483, 16.10.97; Communication on Illegal and Harmful content on the Internet, COM(97) 487, 16.10.97; Council Recommendation 98/560/EC on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity OJ L 270, 7.10.1998.

6 See further Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications OJ L 201, 31.7.2002; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market OJ L 178, 17.7.2000.

7 See Second Evaluation Report From The Commission To The Council And The European Parliament on the application of Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity COM(2003) 776 final of 12 December at <http://europa.eu.int/comm/avpolicy/legis/reports/com2003_776final_en.pdf> at 6.

8 See A. Harcourt, (1998) "Regulation of European Media Markets: Approaches of the European Court of Justice and the Commission's Merger Task Force", 9 *Utilities Law Review* 6 at 276–291; P. Larouche, (1998) EC Competition law and the convergence of the telecommunications and broadcasting sectors 22 Telecommunications Policy 3.

9 See C. Marsden, "Video over IP: the challenges of standardization – towards the next generation Internet", [2003] chapter 8 in Eli M. Noam, Jo Groebel and Darcy Gerbarg (eds.), *Internet Television*; C. Marsden, "The Start of End-to-End? Internet Protocol Television" [2001] 29 *Intermedia* at 4–8.

## 2. Theoretical and Methodical Framework – What is Co-regulation?

The European Commission has readdressed co-regulation of the media in 2004[10]:

> The Recommendation on the protection of minors has a **cross-media approach** and emphasises the **cross-border exchange of best practices** and the development of **co-regulatory and self-regulatory mechanisms.** (emphasis in original)

It explains how best to achieve the regulatory goals:

> A co-regulatory approach may be more flexible, adaptable and effective than straightforward regulation and legislation. With regard to the protection of minors, where many sensibilities have to be taken into account, co-regulation can often better achieve the given aims. Co-regulation implies however, from the Commission's point of view, an appropriate level of involvement by the public authorities.

Co-regulation expresses a dialogue process between stakeholders, which results in a form of regulation which is neither state command-and-control regulation in its bureaucratic central or IRA (Independent Regulatory Agency) specialized functions[11], but is also not "pure" self-regulation as observed in industry-led standard setting in Internet infrastructure.[12] The State and stakeholder groups, including consumers, form part of the institutional setting for regulation. Co-regulation constitutes multiple stakeholders, and this inclusiveness results in greater legitimacy for claims. However, direct government involvement including sanctioning powers may result in the gains of reflexive regulation – speed of response, dynamism, international co-operation between ISPs and others – being lost. It is clearly a finely balanced concept, a middle way between state regulation and "pure" industry self-regulation.

Craig cautions that:

> Regulation is often informal, characterized by negotiation, persuasion and cajoling ... The potential economic advantage of informal regulation in achieving a cost-effective level of regulation must be weighed against the danger of regulation becoming *ad hoc* and circumventing procedural safeguards in legislation.[13]

An economist's notion of regulation "in its widest conception is state intervention in the economic decisions of companies."[14] A broader sociological definition "considers all mechanisms of social control" to be forms of regulation, which encompasses self-regulatory models, the role of firms and social norms. This enables the consideration of non-legal norms, and the interaction of firm, civil society and State. Ayres and Braithwaite state[15]:

> by working more creatively with the interplay between private and public regulation, government and citizens

10 European Commission (2004) Second Evaluation Report, ibid. It continues: "It should consist of cooperation between the public authorities, industry and the other interested parties, such as consumers. This is the approach laid out in the Recommendation. In order to promote national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity, the Recommendation enumerates different objectives to be fulfilled by (i) the Member States, (ii) the industries and parties concerned and (iii) the Commission."

11 R. Baldwin et al., (1998) *Socio-Legal Reader on Regulation*, at 3 explain that "At its simplest, regulation refers to the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with these rules." They explain that recent regulatory design has generally separated rule-making from enforcement/monitoring activities, the former remaining in parliamentary competence, the latter delegated to IRAs.

12 See a summary of de Cockborne's Montreux speech in Adam Watson Brown (1999), Industry Consortia and the Changing Roles of Standards Bodies and Regulators, 35 Inst. Prospective Tech. Stud., June 1999, available at <http://www.jrc.es/pages/f-report.en.html>

13 P.P. Craig at 197 in R. Baldwin and C. McCrudden, (1987) *Regulation and Public Law*.

14 C.D. Foster, *Privatization, Public Ownership and the Regulation of Natural Monopoly* (Oxford: Blackwell, 1992), 186.

15 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992), 4.

> can design better policy solutions ... administrative and regulatory practice is in a state of flux in which responsive regulatory innovations are politically feasible.

Responsive regulation reflects a more complex, dynamic interaction of state and market, a break with more stable previous arrangements.[16] This applies to other globalizing phenomena than digital TV and the Internet, for instance financial and environmental law[17], where initial European public reaction to the Internet resembled that associated with environmental pollution.[18] In advertising protection of minors and consideration of broadcast regulation's extension to new media including the Internet and 3G/UMTS mobile phones[19], co-regulation is a vitally important concept.

A common understanding of the concept of co-regulation, its importance for regulators, and the perspective with which to assess its impact are among the most important threshold issues to address, before it is possible to consider specific regulatory responses.[20] The difference with the Internet is that government regulation has only taken place in special circumstances, with co-regulation being the norm. Price and Verhulst assert the limits of both government and private action in this sphere, and affirm the interdependence of both – there is little purity in self-regulation without at least a lurking government threat to intervene where market actors prove unable to agree. They draw on regulatory theory and empirical studies of advertising and newspaper regulation, demonstrating that in areas of speech, the Internet included, government preference in liberal democracies is for self-regulation.[21] Ayres and Braithwaite state: "Practical people who are concerned with outcomes seek to understand the intricacies of interplays between state regulation and private orderings." [22]

The term "co-regulation" encompasses a range of different regulatory phenomena, a complex interaction of general

legislation and a self-regulatory body. The following table illustrates the range of possible co-regulatory architectures, and therefore the potential complexity involved.

*Table: Possible Co-regulatory Architectures*

| **Example of code** | **Demand for code from** | **Code drafters** | **Code enforcers** | **Sanctions** |
|---|---|---|---|---|
| Video Standards Council (UK) | Industry/ public | Industry with public representation | Industry board with public involvement | Civil penalties for improper video rental |
| ICSTIS – UK Independent Committee for Standards in Telephony and Information Services | Industry/ public | Industry | Industry/public board with recourse to Ofcom | Fines, with backup powers via Ofcom to telecoms providers |
| Italian Internet Service Providers Association | Industry/ Government | Government | Industry | Industry (exclusion from industry association) |

16 G. Teubner, "The Transformation of Law in the Welfare State", in G. Teubner (ed.), *Dilemmas of Law in the Welfare State* (Berlin: W. de Gruyter, 1986), at 8: European conceptions of law as "moving away from the idea of direct societal guidance through a politically instrumentalised law … Instead, reflexive law tends to rely on procedural norms that regulate processes, organisation, and the distribution of rights and competencies."

17 See for instance Sanford E. Gaines and Cliona Kimber, (2001) Redirecting Self-Regulation Env. Law 13(157).

18 See Phillip Whitehead, (1997) Draft Report on the Commission Green Paper on The Protection of Minors and Human Dignity in Audiovisual and Information Services (COM[96]0483 - C4-0621/96) PE 221.804 of 24 April 1997.

19 C. Ahlert, M. Alexander, and D. Tambini, (2003) European 3G Mobile Industry Self-Regulation, IAPCODE Background Paper for World Telemedia Conference at 2: <http://www.selfregulation.info/iapcoda/031106-mobiles-revised-bckgrd.pdf>

20 See also Goldberg, Prosser and Verhulst, *Regulating the Changing Media* (Oxford: Clarendon Press, 1998).

21 Price, Monroe and Stefaan Verhulst, (2000) "In search of the self: charting the course of self-regulation on the Internet in a global environment", chapter 3 in C. Marsden (ed.), *Regulating the Global Information Society*; M. Price, *Television, The Public Sphere and National Identity* (Oxford: Oxford University Press, 1995).

22 Ian and John Braithwaite, (1992) *Responsive Regulation: Transcending the Deregulation Debate* at 3.

In analysing various media sectors, it is vital to recognize the different points at which some form of regulation is necessary, both for content and for economic protection of the consumer. The varying interests of actors result in different incentives to co-operate or attempt unilateral actions at the various points of the value chain. Without sensible analysis of the sectors from film to video to cable, satellite and terrestrial television, to distribution over broadband and mobile phones, it is impossible to rationally assess actors' individual motives and therefore their incentives to pursue regulatory options of various types. Without regulation responsive to both the single European market[23] and the need for constitutional protection of freedom of expression and protection of minors at national levels, co- and self-regulatory measures cannot be sufficiently responsive to economic and cultural environments to be self-sustaining.

## 3. What can we learn from existing studies in analysing co-regulation?

### *3.1. Regulated Self-regulation and European Concepts of Co-regulation*

There have been many studies of self- and co-regulation in the media sector in the past 15 years since Boddewyn's pioneering 1988 study of advertising[24], notably those of PCMLP[25]; of PCMLP faculty and associates, both independently[26] and with collaborators[27]; of Braithwaite and collaborators in Australia and the United States[28]; and of others[29], with shorter country- or sector-specific contributions[30].

Schulz and Held have investigated co-regulation in the German context, specifically in the case of protection of minors.[31] In their view, self-regulation in Anglo-American debate is concerned with "reconciliation of private interests" whereas

their formulation – regulated self-regulation[32] – is indirect state regulation based on constitutional principles. It is the combination of "intentional self-regulation" – the actions of market actors, whether in social or economic settings – with the state

23 A communitaire legal justification for national application of EC competition law under the Treaty of Rome is provided in J. Temple-Lang, (1998) "The Duty of National Authorities under Community Constitutional Law" 23 *European Law Review* 109 at 119.

24 J. J. Boddewyn, (1988) *Advertising Self-regulation and Outside Participation*. See also Lee C. Bollinger, (1976) "Freedom of the Press and Public Access: Toward a Theory of Partial Regulation", 75 *Michigan Law Review* 1.

25 (www.selfregulation.info) PCMLP has conducted three surveys into self-regulation and co-regulation of the media for the Commission, for DG Media Culture and for DG Information Society:
(undated, 1999) Parental Control of Television Broadcasting, A Report;
2000: Internet Codes of Conduct: An Analytic Report on Current Developments
2004: Self-Regulation of Digital Media Converging on the Internet: Industry Codes of Conduct in Sectoral Analysis.

26 M. Price and S. Verhulst, (2004) *Self-Regulation and the Internet*; Pierre Larouche (2001) "Communications convergence and public service broadcasting", at <http://infolab.kub.nl/uvtweb/bin.php3?id=00011353&mime=application/pdf&file=/tilec/publications/larouche2.pdf>

27 C. Marsden (ed.), (2001) *Regulating the Global Information Society*; C. Marsden and S. Verhulst (eds.) *Convergence in European Digital TV Regulation* (1999). See also Peter J. Humphreys, (1996) *Mass media and media policy in Western Europe*; A. Harcourt, (2004) *European Institutions and Regulation of the Media Industry*.

28 Ian Ayres and John Braithwaite, (1992) *Responsive Regulation: Transcending the Deregulation Debate*; Braithwaite and P. Drahos, (2000) *Global Business Regulation*, both contextualizing media co-regulation within the broader regulatory debate. On broader debates, see R. Baldwin, C. Scott, and C. Hood, (1998) *A Reader on Regulation*.

29 C. Marsden, (1999) Pluralism In The Multi-Channel Market: Suggestions For Regulatory Scrutiny, Council of Europe Human Rights Commission, Mass Media Directorate, MM-S-PL [99] 12 Def 2.

30 See special issues of IRIS in 2002-3, notably IRIS Special (2003) *Co-Regulation of the Media in Europe*, Strasbourg, Council of Europe at <http://www.obs.coe.int/oea_publ/iris_special/2003.html.en>; M. Benassi, "New Self-Regulatory Code of Conduct on Television and Minors", IRIS 2003-4:10/21; Andrea Schneider, "Child Protection on German Television – The Voluntary Television Review Body (FSF)", IRIS 1995-3:7/13; M. Capello, "Comparative Advertising Allowed by the Self-regulatory Advertising Code", IRIS 1999-6: 13/25; K. Mastowska, "Television Self-Regulation", IRIS 1999-5:13/16

31 Schulz and Held, (2001) *Regulated Self-Regulation as a Form of Modern Government.*

32 See Wolfgang Hoffman Reim, (1996) *Regulating Media*.

sanction in reserve which results in self-regulation which is "regulated" by the possibility of state intervention. At the Birmingham "Audiovisual Assizes" in 1998, the formulation used was: "Self-regulation that fits in with a legal framework or has a basis laid down in law".[33]

The term "co-regulation" also gives a sense of the joint responsibilities of market actors and the State, short of outright command-and-control, in the activity under investigation. It has been used by the UK's telecom regulator to suggest a state role in setting objectives which market actors must then organize to achieve – with the threat of statutory powers invoked in the absence of market self-regulation.[34] However, co-regulation is used in such a wide variety of circumstances that its specific meaning must be seen in the national, sectoral and temporal context in which it is used.[35]

Schulz and Held suggest that "regulated self-regulation" can be any of these categories: co-regulation, intentional self-regulation, or a third category – "audited self-regulation". Independent audit of self-regulation is a US concept of using an independent standard or professional body to audit a self-regulatory organization or individual company according to preset standards. In the case of ISPs, audited self-regulation might involve a standard being set against which an audit firm could certify organizations (or at least that organizations could self-certify reporting requirements), but could involve the setting of an international standard, as increasingly occurs in accountancy, for instance. At a minimum, dedicated budgetary and personnel resources, with activity reports, would be required to demonstrate regulatory commitment. The German concept of regulated self-regulation gives the State a role when basic constitutional rights need to be upheld: "The extent of possible delegation [to self-regulation] depends … on the relevance … in terms of basic rights".[36]

### *3.2. A Typology of Co-regulation*

Co-regulation in the European context must also be proportional to the aims of the legal instrument, as well as conforming to the competition law of the European Union. Enforcement is the ultimate responsibility ("the safety net") of the State. In Schulz and Held's case study, Australia, practical self-regulation is illustrated in the application of the 1997 Telecoms Act and 1992 Broadcasting Services Act, where four types of regulatory scheme can be identified.[37]

| **Regulatory type** | **State role** |
|---|---|
| 1. Intentional or "pure" self-regulation | No state IRA involvement |
| 2. Industry codes | Registered with the state IRA |
| 3. Industry standards | Mandatory codes set in the absence of pan-industry code agreement |
| 4. Command-and-control | Set by state IRA pre-empting attempts at self-regulatory action |

The vital lessons from co-regulatory studies, upon which the final www.selfregulation.info report draws, are several:

- Consistency of methodology is vital for comparative data capture to be accurate, between sectors as well as national examples.

33 See typologies and quotation at 7 in Schulz and Held supra n.35.

34 See Richard Thomas's report to the National Consumer Council (UK) "Better business practice: how to make self-regulation work for consumers and business" at <http://www.ncc.org.uk/pubs/pdf/self-regulation_gpg.pdf> and OFCOM (2004) Consultation Document "Criteria for Transferring Functions to co-Regulatory Bodies" <http://www.ofcom.org.uk/consultations/past/co-reg/?a=87101>

35 Schulz and Held detail different meanings used in the UK, Australia and France, at 7,14, supra n.35.

36 Schulz and Held (2001) at 8, supra n.35.

37 See J. Reidenberg, (2004) States and Law Enforcement, 1 Uni.Ottawa L.& Tech.J. summarizing J. Reidenberg, (2002) Yahoo and democracy on the Internet, 42 Jurimetrics 261.

- Iterating and modifying the template can only be conducted prior to the study, by taking test cases to pilot the methodology.
- Co-regulation is a moving target – the national and sectoral templates for co-regulation have to be modified following each survey in order to encompass the different and dynamic practices of co-regulation in each geography and sector examined.
- It is essential in surveys to conduct field research in as short a time as possible, for the reasons outlined above.

**4. Does co-regulation deliver the expected results?**

As outlined above, the PCMLP project has conducted research in the 15 pre-2004 Member States in the following areas: broadcast co- and self-regulation; mobile telephony and child protection; Internet self-regulation; computer games and video cassette ratings schema; print news media self-regulation. Based on the www.selfregulation.info report and other prior work, we can offer some tentative initial hypotheses. PCMLP refers to its conclusions, final chapter and executive summary for the IAPCODE project, which contain detailed options for co-regulation in the media including specifications for regulatory audit. Three options suggest themselves:

1. Adopting best practice in self-regulatory approaches taken from US and possibly UK models;
2. Developing and extending a sophisticated version of co-regulation such as that found in Australia or Germany, with a pan-sectoral focus;
3. Extending practice to a pan-European role, as in the Internet sector, where INHOPE, EuroISPA or ISFE have adopted a successful model (for details see main IAPCODE report).

However, the role of free speech, cultural diversity and the enforceability of such regimes remain problematic.

These three options are in addition to nation-specific and sector-specific status quo options, which one might term Option 0.

In considering the range of self-regulatory solutions across Europe, it is necessary to reflect on exactly why there is a range of responses, and whether it is possible to conceive of a European model of media self-regulation:

- What is the most important national factor with regard to self-regulation, and what are the barriers to international co-operation?
- Is it legal and constitutional and the implications for self-regulation or rather the differences in cultural content standards?
- Is it rather a more complex set of factors relating to institutional political economy?

To place our media self-regulation survey in the context of country-level differences and EU-wide changes that impact on Member States in contrasting ways, the level of analysis must be useful for:

- Understanding self-regulation on the national level;
- For policymaking that is concerned with co-ordinating national media approaches across sectors, and
- For evaluating prospects for convergence in practices on the EU level.

Our approach also entails difficulties in assessing changing political cultures. Cultural as well as economically rational motivations differentiate state and market actors. Pan-European options present further complexity: multilateral solutions may therefore be theoretical solutions to intractable real-world problems. Yet, when self-regulation is put into practice this is

often first done on the national level, and here attention to economic governance, political culture, civil society and institutions in general may make a crucial distinction in assessing which self-regulatory schemes succeed and which fail.

Codes of conduct, in order to be legitimate, credible, transparent and effective need to include clear and workable procedures for review and amendment of the code. Ideally this should include some input from the adjudication body. The most effective and skilled code operators take the following issues into account when revising their codes:

- The convergence of national, regulatory and corporate cultures;
- The changing nature of the relationship between government and industry;
- The evolving technological architecture that underwrites self-regulation;
- The further development of standards, codes, and rules;
- The growth and change of cultural norms and of public understanding surrounding self-regulation; and
- Third party consultation or audit.

## 5. Recommendations from the IAPCODE Study

Our recommendations can help the effective development of media codes of conduct and co-regulation of Internet content in specific ways. Our key finding is that technological progress brings about change and that self-regulation can respond more rapidly and efficiently than state regulation. There is no universally acceptable recipe for successful self-regulation, as regimes must be adjusted to the needs of each sector and different circumstances (technological changes, changes in policy in response, a country's legal system, case law of Euro-

pean courts, and so on). To illustrate, broadcasting is an area in which technological progress resulted in complexity and the increase of self-regulation responds in part to policy changes prompted by those technological changes. The European monopolistic broadcasting model which developed with radio, and was maintained for television, was first challenged by commercial terrestrial services. Further pluralism brought about first by cable and satellite, and then digital technologies including the Internet, forced changes in the regulatory environment and public authorities increasingly delegated the power to regulate to market actors. The trend is towards continued delegation (with regulatory authority audit of the resources, procedures, transparency, stakeholder participation and market effect of the self-regulatory scheme).

***Key Recommendation.*** Adequate resourcing is the key to successful self-regulation. Policy on self-regulation must take into account a broader view of the sustainability, effectiveness and impact on free speech of self-regulatory codes and institutions. We recommend applying an auditing procedure for establishing self-regulatory institutions and codes. Notwithstanding the centrality of speech freedoms in constitutions, we hold that this regulatory audit burden is a minimal price to pay for effective self-regulation in the public interest.

***Convergence, the Single Market and Future Trends in Co-regulation.*** Significant economies of scale are likely to be realized through functional integration of certain key aspects of the content regulation value chain horizontally across sectors and across EU Member States. The rating of computer games has illustrated the potential for developing a common pan-European ratings structure. Germany and the Netherlands operate a cross-media rating and labelling scheme. In a situation of increasing cross border trade within the EU, this trend is

set to continue. An important use of the Internet is to access news. Journalistic ethics online, often an extension of systems developed for the print media over decades, has the potential for a pan-European structure. Online news services, online versions of newspapers, news aggregators, as well as self-regulatory mechanisms to which they may belong could soon acquire relevance beyond national borders. Readership may start seeking access to self-regulatory bodies and complaint mechanisms located outside national jurisdictions.

Although the *legislative* role of the European institutions is currently limited (prior to any EU constitutional settlement), several recommendations have been made as cited below. And it is likely that in a single market context, there will be significant self-interest on the part of industry in self-regulation. More research and development, benchmarking and technical assistance in disseminating best practice between Member States is clearly essential to assist industry bodies in the exploitation of economies of scale and scope in self-regulation across the various converging media sectors in the single market, and to ensure greater effectiveness of self-regulation.

The general trend is towards an expansion of scope of co-regulation, often at the expense of statutory regulation. Many IRAs are exploring the possibility of "sunsetting" particular regulations in the event that co-regulatory alternatives can be found.

***Funding and Sustainability of Media Co-regulatory Regimes.*** Where there is a clear industry interest in self-regulation to improve market penetration, or to head off threats of statutory regulation, there are adequate market incentives for resources to be allocated to self-regulatory activities. However, the enlightened self interest required is vulnerable to changing personnel and market structures. Self-regulatory

institutions, where they do not have access to compulsory funding, will not enjoy the funding necessary to meet standards of transparency, accountability and due process.

A wide variety of models of self-regulatory tools exist. Some of these are based on adequate standards of transparency, inclusion, due process, resources and so forth, and some clearly are not. As a result there is some concern with the development of codes that insufficient standards apply to both law enforcement/child protection and protection of freedom of expression rights. If these mechanisms are improperly structured we can expect public harm to result in the medium term. The European Commission and Council of Europe should develop and publish clear benchmarks for acceptable levels of transparency, accountability and due process and appeal, particularly with regard to communications regulation that may impact upon freedom of expression. Self-regulatory institutions should follow the guidelines for transparency and access to information that are followed by public and government bodies according to international best practice. At the very least self-regulators should provide summaries of complaints by clause of code of conduct, numbers of adjudications, and findings of adjudications on their website. Failure to conform to these baseline standards of transparency should be viewed as a failure of self-regulation.

***Co-regulation and Freedom of Expression.*** Self-regulation has an ambivalent and tense relationship with fundamental rights to freedom of expression. At one level this depends on definitions. In some cases, and particularly in the US, case law tends to favour a view of freedom of expression as a negative right: i.e. it exists where there is an absence of state interference with communication. In other traditions, freedom of expression is equally endangered by private bodies such

as corporations. In the former case, self-regulation is likely to be viewed favourably in terms of its impact on freedom of expression because, by definition, freedom of expression is not endangered by non-state entities. However, this does not mean that positive rights to free speech are protected by self-regulatory institutions. On the contrary, because self-regulatory institutions are not public bodies they may be less accountable. Self-regulation could be used instead of government regulation to avoid constitutional free speech issues when regulating more stringently: for example, broadcasting pre-publication control as carried out by the *Freiwillige Selbstkontrolle Fernsehen (FSF)* in Germany and similar bodies in other countries. Self-regulation offers a complaints procedure and alternative dispute resolution. However, there may be less protection for rights than with the protection offered by the law. For example, injunctions, fines and sanctions may be unavailable within a self-regulatory regime. Similarly victims may not be able to access financial compensation if complaints are resolved by self-regulation rather than in court.

***Stakeholder Participation in Co-regulation.*** A key lesson is that it is essential to achieve a balance between industry representatives and non-industry members on boards. This combination strengthens its legitimacy. This, in turn, may lead to a virtuous circle in which the enlightened self-interest of the industry can help the media to willingly fund the mechanism of code implementation, and abide by decisions. Industry professionals should constitute a minority on boards of content self-regulatory bodies. Measures should be adopted to ensure that bodies that are 100 per cent funded by their industry are not captured by it. These measures could include: fixed tenure for board members, dismantling separate "funding boards" (who may attempt to hold regulatory boards to ransom), replacing

them with a compulsory levy on industry participants, as currently applies to premium telephony in for instance the UK. This transparent and guaranteed funding then permits industry participants to play a much greater expert role in advising the regulator, with less conflict of interest. Despite recent progress, consumer groups often lack the technical and legal knowledge of the application of media self-regulation to the Internet, especially in new capabilities of mobile and broadband.

***Internet Co-regulation.*** The following twelve recommendations are directed to those public and private institutions engaged in Internet regulation. The response to the extensive surveys conducted by IAPCODE has been exceptionally meagre, demonstrating a lack of resources devoted to self-regulation within Internet service providers. In part, this may be because self-regulation in the sector is of such recent vintage compared to the other sectors studied. We recommend a significant role in inculcating a regulatory culture by the IRAs in each country. The several countries conforming to best practice may find the co-regulatory audit concept, in particular, a relatively low hurdle to cross. Nevertheless, we believe that co-regulation will encourage publicity for those best practice schemes, and therefore better public awareness of their work. For the other under-resourced market actors and their schemes, co-regulatory audit will act as a much-needed reality check on the resources required for effective self-regulation in sectors where freedom of speech concerns are so critical. We begin with four recommendations on strengthening the relationship between industry self-regulatory codes and user-based solutions: holistic thinking and media literacy, filtering, hotlines and trustmark accreditation.

Inappropriate and harmful content is becoming a massive problem – unsolicited adult content is part of a larger content category including unsolicited commercial communication

(spam) and unsolicited code (including malicious code – viruses and spyware). It threatens trust in the medium as a whole, including e-commerce and even e-mail. Legislation is dealing with some of these issues, such as spam. Self-regulation arrangements should take account of these new initiatives and any changes to their role that may result. There is insufficient "joined up" thinking at national and regional level about the interrelationship between different layers of the Internet: content, physical and software protocols. We cannot regulate adult content alone without consideration for other content type regulation, such as spam blocking, and their effect on other layers.

***Filtering and Hotlines.*** Where filtering rules and self-regulatory hotlines have been instituted, there has been a heroic assumption that users will install technical solutions and be aware of hotlines, and that the 10 billion web pages will be self-classified or policed effectively. This is becoming increasingly unlikely. Technical enthusiasts or global user communities without real self-interest cannot achieve the co-ordination necessary. Future studies of filters and hotlines should continue to focus not only on the technical capabilities of filtering technology or police co-operation, but also on the skills of users, parents, children and others and awareness of these technologies.

End-user software, for instance filters and search engines, raise significant problems for freedom of expression. For example, popular search engines may have rules for search that prioritize content inappropriately for specific cultures: by language, content type or software format. It is essential that studies of filters be instituted that examine the freedom of speech implications of commercial ranking of sites, pages, content types, languages. ISP or portal judgements of speech freedoms must be subjected to national law.

***Notice and Take Down: "Put Back" in the E-Commerce Directive.*** The opacity of self-regulatory regimes is also a cause for concern in the Notice and Take Down regime for ISPs. Where an ISP substitutes its own judgement of harmful or potentially illegal content, with or without trained legal advice, it does so "in the shadow of the law". This privatized enforcement of freedom of expression is a continued cause for concern. Where there is even a suspicion that Notice and Takedown procedures are not being adhered to, the legitimacy of self-regulation and the ISP industry suffers. Presently ISPs appear to be substituting their view of illegal, harmful (and copyright infringing) content without effective legal procedures for content producers to respond and appeal. This is a direct infringement of freedom of expression on the Internet, which is unchecked by current legislation. We recommend that "put back" be seriously considered as a policy option when the E-commerce Directive is reviewed.

***Co-regulation: Resource Audit Role of IRAs.*** Generally, there is a lack of credibility in Internet co-regulatory forums. This is in part due to lack of technical and regulatory expertise, but also due to insufficient co-operation in the industry. It is particularly difficult for regulatory staff in smaller and medium-sized media businesses to make the internal business case to release resource, especially legal resource, for self-regulatory solutions. ISPs often do not have the resources necessary to meet high standards of transparency, accountability and due process in self-regulation. Decisions to take part in self-regulatory schemes are often taken without sufficient knowledge of the longer term cost implications.

- **Industry** must take active part in co-regulatory initiatives. Whereas large multinationals (such as Microsoft, AOL, and ISP subsidiaries of national telcos) and voluntary actors

(typically from research or educational backgrounds) are active participants, proactive measures need to be taken to fully engage with user groups, and smaller for-profit content and access providers.

- **IRAs** should convene a **co-regulatory forum** on a quarterly basis located at their offices, with minutes and participants published on the IRA website. This will introduce much-needed transparency into the co-regulatory process, to ensure all commercial operators take content co-regulation seriously. Effective co-regulatory schemes will find this no extra burden; indeed it will act as a stimulus for new members and be educational for the consumer.
- **Accrediting** co-regulatory codes of conduct and behaviour can only be carried out under the auspices of IRAs, who have the regulatory resource, stakeholder participation and competition law exclusion to effectively institute a voluntary kite-marking scheme. IRAs may choose to subcontract the scheme's functioning to a third party.
- **IRA audit** of self-regulatory activity, incorporating assessment of market structure and interests in self-regulation and an assessment of impact on fundamental rights, must take place within a dynamic and pragmatic framework which encourages rather than discourages self-regulatory activity where it is appropriate. We also recommend a "national resource audit of ISP and content sectors" – to answer essential questions of effective and sustainable ISP self-regulation:
  - Who is engaged in the Notice and Take Down regime?
  - What is the dedicated legal resource in each ISP?
  - Are the crucial code writing and adjudication functions sufficiently independent from industry?
  - Who performs the freedom of expression function in each ISP?

- Does the self-regulatory industry scheme, as well as individual ISPs, have sufficient resource "ringfenced" away from industry participant control, to operate efficiently, transparently and fairly?

## 6. Benchmarking and Research for a Forward-Looking Agenda

Accession States to the EU have substantial need of technical assistance in formulating co-regulatory schemes. Such assistance is needed in legislative and technical areas as much as in co-regulation itself. In particular, stakeholder/consumer groups require assistance in playing an effective role in co-regulatory discussions. The European Commission and OSCE are urged to establish expert groups in these areas. It is therefore suggested that a Technical Advisory Board be established for co-regulatory schemes, best practice and policy research. The TAB can take composition from national experts (in the manner of the moribund DGInfoSoc Legal Advisory Board). It requires an active secretariat and a willingness to consult at short notice where issues of content regulation arise. Its members must be appropriately qualified.

- The TAB would need to advise on achieving a progressive, forward-looking agenda, actively engaging industry and stakeholder interests (including technical stakeholders) through partnerships with, for instance, the spam forum now established by the OECD.
- Co-regulatory practice needs to take account of rapidly developing technologies and content types in [a] broadband; and [b] mobile Internet networks.
- The TAB would be required to engage with other advanced Internet stakeholders from East Asia, North America, and

from sectors including software, content and hardware developers. Without these inputs, its work would be limited in scale and scope to a regional and narrow view of the Internet

- The TAB would be required to pursue an active engagement with stakeholders from across the many media and communication sectors, and from multinational stakeholders active in European markets, as well as representatives from European media industries and other national and regional stakeholders.

Yaman Akdeniz

# Who Watches the Watchmen? The Role of Filtering Software in Internet Content Regulation

***Introduction.*** There have been many initiatives to deal specifically with the existence of illegal and harmful content over the Internet. These include an emphasis on self-regulation by the Internet industry with the creation of Internet hotlines for reporting illegal Internet content to assist law enforcement agencies, and the development of filtering and rating systems to deal with children's access to content which may be deemed harmful. These two issues are different in nature and should be addressed separately. Confusion between the two different problems seems to delay the appropriate policy initiatives to tackle them. But as far as the debate on "harmful content" is concerned, it should be stressed from the beginning that what may not be appropriate for children may certainly be legal for, and therefore accessible by, willing adults.

This paper will try to provide a broad overview of Internet content regulation and related policy initiatives and will argue that there is too much unwarranted anxiety about what is and what is not available over the Internet. Furthermore, the specific technical solutions offered within different forums for the availability of harmful Internet content may not be the right solutions to pursue as these can have serious consequences for freedom of speech in cyberspace.

***Identifying the Problems.*** The decentralized nature of the Internet means that there is no unique solution for effective regulation at the national level. However, it would be wrong to

dismiss the role that may be played by governments, especially in creating laws, maintaining the policing of the State and co-ordinating and aligning national policy with initiatives and policies at both supranational and international levels of Internet governance. Since October 1996, the European Commission has drawn a distinction between illegal and harmful content.[1] In its Communication on Illegal and Harmful Content on the Internet the Commission stated that:

> These different categories of content pose radically different issues of principle, and call for very different legal and technological responses. It would be dangerous to amalgamate separate issues such as children accessing pornographic content for adults, and adults accessing pornography about children.[2]

Although the Commission's Action Plan for the European Union for a safer use of the Internet[3] (which followed from the above-mentioned Communication paper) suggests that "harmful content needs to be treated differently from illegal content",[4] these categories have never been clearly defined by the Commission in its original Action Plan or by regulators elsewhere. The Action Plan states that illegal content is related to a wide variety of issues such as instructions on bomb-making (national security),[5] pornography (protection of minors),[6] incitement to racial hatred (protection of human dignity) and libel (protection of reputation). But none of these categories provided by the European Commission are necessarily "illegal content" and are not even considered "harmful content" (probably undefinable in a global context) by many European countries.

***Illegal Content.*** It is wrong to consider the Internet a "lawless place"[7] and therefore the law of the land also applies to the Internet in theory. This is also true regarding the availability of illegal content over the Internet. The most common and

most frequently cited example of illegal content is the availability of child pornography over the Internet.[8] Consequently, the whole issue of illegal content and how to deal with this

| Child Pornography | Hate Speech | Pornography |
|---|---|---|
| • Society sees it as a problem.<br>• Child pornography is not a new problem.<br>• Digital child pornography is not a new problem – it can be traced back to the mid-1980s.<br>• Clear cut example of "illegal content".<br>• Criminalized by the CoE Cybercrime Convention, the UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and the EU Council Framework Decision on combating the sexual exploitation of children and child pornography (not adopted yet).<br>**• UN Optional Protocol: 108 signatories, 71 parties as of February 2004.** | • Society sees it as a problem.<br>• Racism and xenophobia are not new problems.<br>• Digital hate is not a new problem – it can be traced back to the mid-1980s.<br>• Difficult to categorize: Depending upon its nature and the laws of a specific State it could be considered illegal or harmful/offensive (BUT legal).<br>• Harm criteria are different in different European States.<br>• CoE Additional Protocol to the Cybercrime Convention on the criminalisation of acts of a racist and xenophobic nature committed through computer systems: **23 signatories so far but no ratifications.** | • Society does NOT always see it as a problem.<br>• Pornography is certainly NOT new.<br>• Difficult to categorize: Depending upon its nature and the laws of a specific State it could be considered illegal or harmful/offensive (BUT legal).<br>• Harm criteria are different in different European States.<br>• UK approach is rather different to the German or Scandinavian approaches to sexually explicit content.<br>**• NO international attempt to regulate "sexually explicit content".** |
| **Illegal** ← | ? | → **Legal** |

*Table 1: Note that categorization of content is not straightforward and is often problematic.*

1 See European Commission Communication, Illegal and Harmful Content on the Internet, Com (96) 487, Brussels, 16 October 1996; and European Commission Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services, Brussels, 16 October 1996.

2 Ibid., p. 10.

3 Decision No. /98/EC of the European Parliament and of the Council of adopting a Multiannual Community Action Plan on promoting safer use of the Internet by combating illegal and harmful content on global networks, December 1998. See further C. Walker and Y. Akdeniz, "The governance of the Internet in Europe with special reference to illegal and harmful content", [1998] *Criminal Law Review*, December Special Edition: Crime, Criminal Justice and the Internet, 5–19.

4 Ibid.

5 Next stop is bookshops as a book named *Anarchist's Cookbook* is available through well-known bookshops such as Waterstone's and Dillons in the UK.

6 See Y. Akdeniz, *Sex on the Net? The Dilemma of Policing Cyberspace* (Reading: South Street Press, 1999).

7 See J.R. Reidenberg, "Governing Networks and Cyberspace Rule-Making", [1996] *Emory Law Journal* 45.

8 See generally Y. Akdeniz, "Child Pornography", in Y. Akdeniz, C. Walker and D. Wall (eds.), *The Internet, Law and Society* (Addison Wesley Longman, 2000).

has revolved around child pornography, even though child pornography and paedophilia are not necessarily Internet-specific problems. Another concern for content-related criminal activity by law enforcement agencies is the possibility of using the Internet for harassment and threats. As Table 1 illustrates, it is not always easy to categorize certain types of content as illegal even though these may sometimes be regarded as objectionable or harmful.

It should also be noted that law enforcement bodies remain concerned about the incidental use of the Internet for existing crimes such as fraud,[9] and the emergence of specific cybercrimes[10] such as unauthorized access (hacking) to computer networks,[11] distribution of computer viruses such as the "ILOVEYOU" or the Melissa viruses,[12] and the denial-of-service attacks to computer networks. However, as these issues are not content-related they will not be discussed further in this paper.

***Harmful Content.*** The difference between illegal and harmful content is that the former is criminalized by national laws, while the latter is considered offensive, objectionable, unwanted, or disgusting by some people but is generally not criminalized by national laws. Internet content that may be labelled "harmful" includes sexually explicit material, political opinions, religious beliefs, views on racial matters, and sexuality. But it should be noted that in the *Handyside*[13] case the European Court of Human Rights confirmed that freedom of expression extends not only to ideas and information generally regarded as inoffensive but even to those that might offend, shock, or disturb,[14] and this sort of information legally exists over the Internet as well as in other media.

The governance of this sort of Internet content may differ from country to country. This is certainly the case within

Europe where there are different approaches to sexually explicit content, hate speech, or Holocaust denial.[15] For example, under the Obscene Publications Act, in the UK it is illegal to publish and distribute obscene publications. Yet possessing or browsing through sexually explicit and obscene content on the Internet is not an illegal activity for consenting adults. Furthermore, there are no UK laws making it illegal for a child to view such content in a magazine or on the Internet. The laws normally deal with the provision of such content to children.

Therefore, harm is a criterion which depends upon cultural differences and this is accepted within the jurisprudence of the European Court of Human Rights.[16] Nevertheless, the availability of harmful Internet content is a politically sensitive area and a cause for concern for European regulators.

***Approaches to Harmful Content.*** "Internet users are concerned about protecting children and vulnerable people from illegal or immoral material. A May 1999 survey of US parents showed

9 See D. Davis, "Criminal Law and the Internet: The Investigator's Perspective", [1998] *Criminal Law Review*, December Special Edition, 48–61.

10 See D. Wall, "Policing and the Regulation of the Internet", *Criminal Law Review*, December Special Edition (1998), 79–90.

11 See Y. Akdeniz, "Section 3 of the Computer Misuse Act 1990: an Antidote for Computer Viruses!", [1996] 3 *Web Journal of Current Legal Issues*.

12 The Melissa virus first appeared on the Internet in March of 1999. It spread rapidly throughout computer systems in the United States and Europe. It is estimated that the virus caused $80 million in damages to computers worldwide. David Smith pleaded guilty on 9 December 1999 to state and federal charges associated with his creation of the Melissa virus. See *United States of America v. David Smith*, Criminal No. 99-18 U.S.C.§ 1030(a)(5)(A) information, United States District Court District of New Jersey.

13 See *Handyside v. UK*, App. no. no. 5493/72, Ser A vol.24, (1976) 1 EHRR 737.

14 See further *Castells v. Spain,* App. no.11798/85, Ser. A vol.236, (1992) 14 EHRR 445.

15 See further Y. Akdeniz, "Case Review: League Against Racism and Antisemitism (LICRA), French Union of Jewish Students, v. Yahoo! Inc. (USA), Yahoo France", [2001] *Electronic Business Law Reports*, 1(3), 110–120 at <http://www.cyber-rights.org/documents/yahoo_ya.pdf>

16 See for example *Handyside v. UK*, App. no. no. 5493/72, Ser A vol.24, (1976) 1 EHRR 737.

that 78% have concerns about the content of Internet material to which their children have access. … Control of content for consumers is thus a serious, and growing issue and a problem that must be solved."[17]

At a supranational level, the European Union Action Plan on the safer use of the Internet[18] encourages self-regulatory initiatives to deal with harmful content such as the creation of a European network of hotlines for Internet users to report illegal content like child pornography; the development of self-regulatory and content-monitoring schemes by access and content providers; and the development of internationally compatible and interoperable rating and filtering schemes to protect users. Furthermore, it advocates measures to increase awareness of available possibilities among parents, teachers, children and other consumers to help these groups to use the networks whilst choosing the appropriate content and exercising a reasonable amount of parental control.

***Development of Rating and Filtering Systems.*** To deal with harmful Internet content, the European Union encourages the development of rating and filtering systems. Rating systems, such as the Platform for Internet Content Selections (PICS)[19], work by embedding electronic labels in web documents to vet their content before the computer displays them.[20] The vetting system could include political, religious, advertising or commercial topics. These can be added by the publisher of the material, or by a third party (e.g. by an ISP, or by an independent vetting body). Filtering software is also available and is intended to respond to the wishes of parents who are making decisions for their children. There are currently around 50 filtering products (mainly US-based),[21] and these do not necessarily reflect the cultural differences in a global

environment such as the Internet. The type of harmful/offensive/disturbing/shocking/unwanted or undesirable content that is blocked by various filtering software usually include the following:

- Sexually explicit material
- Graphically violent material
- Content advocating hate
- Content advocating illegal activity, such as drug use, bomb-making, or underage drinking and gambling

In addition to these general categories, GetNetWise.Org identified tools that also limit access to information relating to abortion advocacy, advertising, alternative journals, art, lifestyles, humour, leisure activities, politics, religion and many others which would not be categorized or deemed either "harmful" or "offensive".[22] It is also difficult to categorize this content as "shocking"; in fact the only terms that could possibly apply are "unwanted" or "undesirable". There may well be parents out there who do not want their children to access art-related or humorous web pages or, for that matter, political websites such as that of George W. Bush.[23] But such categorization, and what is blocked as a result by producers of filtering software,

17 Paragraph 10.13 of the Cabinet Office report *e-commerce@its.best.uk.*

18 Action Plan on promoting safer use of the Internet by combating illegal and harmful content on global networks, December 1998.

19 Note also the ICRA (Internet Content Rating Association) system which follows from the RSACi system. See <http://www.icra.org/> for further information.

20 See Computer Professionals for Social Responsibility, "Filtering FAQ" <http://quark.cpsr.org/~harryh/faq.html>. Note that most filtering systems based on third-party rating, such as CyberPatrol, are compliant with the PICS labelling system.

21 See <http://kids.getnetwise.org/tools/index.php>

22 See <http://kids.getnetwise.org/tools/blockother>

23 See BBC News, "Attack prompts Bush website block" 28 October 2004, at <http://news.bbc.co.uk/1/hi/technology/3961557.stm>

remains dubious. Even if parents do not want their children to access political websites, they will not know what other websites have been blocked by the product maker.

Yet self-rating and filtering systems are promoted as empowering user choice by the industry,[24] governments and international organizations. Bertelsmann Foundation's Memorandum in 1999 argued that "used wisely, this technology can help shift control of and responsibility for harmful content from governments, regulatory agencies, and supervisory bodies to individuals."[25] The memorandum urged that there should be an "independent organization to provide a basic vocabulary for rating and to oversee updates to the system at periodic intervals."

***A Critique of Rating and Filtering Systems.*** It is important to show the whole picture concerning rating and filtering systems, including the limitations and criticisms about their use and development – aspects that are usually not considered by government representatives, the European Commission and industry bodies.[26]

> Originally promoted as technological alternatives that would prevent the enactment of national laws regulating Internet speech, filtering and rating systems have been shown to pose their own significant threats to free expression. When closely scrutinized, these systems should be viewed more realistically as fundamental architectural changes that may, in fact, facilitate the suppression of speech far more effectively than national laws alone ever could.[27]

It would seem that both rating and filtering systems are problematic. They do not appear to offer total protection to citizens or address content-related problems in full. They could be defective, and in many cases filtering software results in massive overblocking. At the same time some filtering software has

been criticized for underblocking.[28] In general, there is too much reliance on mindless mechanical blocking through identification of key words and phrases. Moreover, this is usually based on the morality that an individual company/organization is committed to while developing their rating and/or filtering criteria and databases. So, broad and varying concepts of offensiveness, inappropriateness, or disagreement with the political viewpoint of the manufacturer are witnessed with such tools.

***Limited Functionality.*** First of all, although various governments welcome the use and development of rating systems, the capacity of these tools is limited to certain parts of the Internet. But official statements offer no warning about these limitations.

Rating systems are designed for World Wide Web sites while leaving out other Internet-related communication systems such as chat environments,[29] file transfer protocol servers (ftp),[30] Usenet discussion groups, real-audio and real-video

24 See the Bertelsmann Foundation's Memorandum on Internet Self-Regulation, September 1999, at <http://www.stiftung.bertelsmann.de/internetcontent/english/download/Memorandum.pdf>

25 Ibid.

26 See generally Electronic Privacy Information Center, *Filters and Freedom – Free Speech Perspectives on Internet Content Controls* (Washington DC: EPIC, September 1999). Please note that partly as a result of the writings contained in this collection, the headlong rush toward the development and acceptance of filtering and rating systems has slowed.

27 See the Global Internet Liberty Campaign Statement submitted to the Internet Content Summit, Munich, Germany, September 1999.

28 Websense, at some stage, published a daily list of sexually explicit websites on its own website to show the websites that its competitors did not block. However, anybody – including students from schools that were using SmartFilter and SurfControl – could access the list, simply by clicking a button on the Websense site agreeing that they were over 18. See Peacefire's report on Websense at <http://peacefire.org/censorware/WebSENSE/>

29 Interactive environments like chat channels cannot be rated as the exchange and transmission of information takes place live and spontaneously.

30 The estimated amount of ftp servers on the Internet is about a million. Some of these online libraries may have offensive content or legal content that may be considered harmful for children.

systems which can include live sound and image transmissions, and finally the ubiquitous e-mail communications. These cannot be rated with the systems that are currently available and therefore the assumption that rating systems would make the Internet a "safer environment" for children is wrong as WWW content represents only a fraction of the whole of the Internet. Although it may be argued that the World Wide Web represents the more fanciful and most rapidly growing side of the Internet, the problems that are thought to exist on the Internet by regulators are not specific to the World Wide Web.

***Definitional and Categorization Problems.*** Secondly, even on the World Wide Web, where rating and filtering technology applies, it is not clear what the regulators have in mind regarding the sort of content that should be rated. Examples from official statements in which the category is referred to as "harmful", "immoral", "undesirable", "unwanted", or "objectionable" content have been provided above.

According to the UK Internet Watch Foundation, there is "a whole category of dangerous subjects" that require ratings and these relate to drugs, sex, violence, dangerous sports like bungee jumping, and hate speech.[31] This kind of content would certainly include such publications as *The Anarchist Cookbook*,[32] which can be downloaded from WWW sites but can also be obtained through ftp servers or automatic e-mail services, not to mention from well-known bookshops such as Waterstone's, Dillons and Amazon.co.uk in the UK.

***Third Party Systems and Problems with Accountability.*** Thirdly, if the duty of rating were handed to third parties, this would cause problems for freedom of speech and with few third-party rating products currently available, the potential for arbitrary censorship increases. This would leave no scope for argument

and dissent because the ratings would be done by private bodies without "direct" government involvement. When censorship is implemented by government threat in the background, but run by private parties, legal action is nearly impossible, accountability difficult, and the system is not open or democratic.[33]

***Defective Systems.*** Fourthly, another downside of relying on such technologies is that these systems are defective[34] and in most cases they are used for the exclusion of socially useful websites and information.[35] It has been reported many times that filtering systems and software are over-inclusive and limit access and censor inconvenient websites, or filter potentially educational materials regarding AIDS, drug abuse prevention, or teenage pregnancy. The general excuse remains the protection of children from harmful content and also the duty of the industry to give more choices to the consumers. However, filtering software and rating systems are being used to exclude minority views and socially useful sites rather than to protect children.[36] According to the report on Internet Filters

31 *Wired News*, "Europe Readies Net Content Ratings", 7 July 1997.

32 William Powell, *The Anarchist Cookbook*, paperback reissue edition (Barricade Books, 1989).

33 See generally Cyber-Rights & Cyber-Liberties (UK) Report, "Who Watches the Watchmen: Internet Content Rating Systems, and Privatised Censorship", November 1997 <http://www.cyber-rights.org/watchmen.htm> and Cyber-Rights & Cyber-Liberties (UK) Report: "Who Watches the Watchmen: Part II – Accountability & Effective Self-Regulation in the Information Age", September 1998 at <http://www.cyber-rights.org/watchmen-ii.htm>

34 Electronic Privacy Information Center, "Faulty Filters: How Content Filters Block Access to Kid-Friendly Information on the Internet", Washington, December 1997, at <http://www2.epic.org/reports/filter-report.html>

35 See generally the PeaceFire.Org's pages at <http://www.peacefire.org> as well as Seth Finkelstein's excellent Anticensorware Investigations – Censorware Exposed pages at <http://sethf.com/anticensorware/>

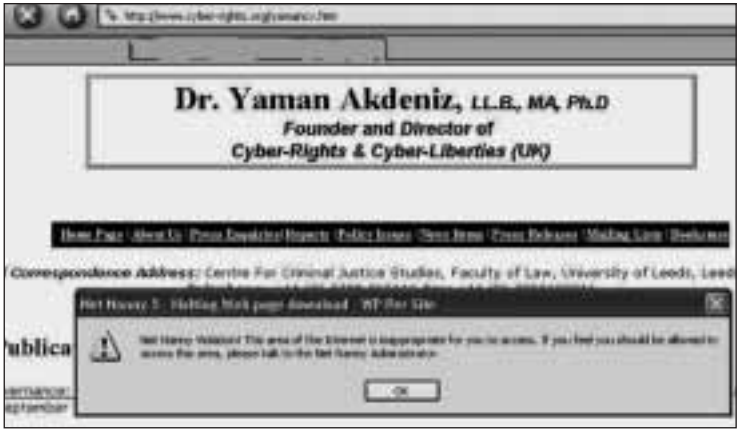
36 Gay & Lesbian Alliance Against Defamation report, "Access Denied: The Impact of Internet Filtering Software on the Lesbian and Gay Community", New York, December 1997, at <http://www.glaad.org/glaad/access_denied/index.html>

by the National Coalition Against Censorship:[37]

- I-Gear blocked an essay on "Indecency on the Internet: Lessons from the Art World", the United Nations report *HIV/AIDS: The Global Epidemic*, and the homepages of four photography galleries.
- Net Nanny, SurfWatch, Cybersitter, and BESS, among other products, blocked House Majority Leader Richard "Dick" Armey's official website upon detecting the word "dick".
- SmartFilter blocked the Declaration of Independence, Shakespeare's complete plays, *Moby Dick*, and *Marijuana: Facts for Teens*, a brochure published by the National Institute on Drug Abuse (a division of the National Institutes of Health).
- SurfWatch blocked human-rights sites like the Commissioner of the Council of the Baltic Sea States and Algeria Watch, as well as the University of Kansas's Archie R. Dykes Medical Library (upon detecting the word "dykes").
- X-Stop blocked the National Journal of Sexual Orientation Law, Carnegie Mellon University's Banned Books page, "Let's Have an Affair" catering company, and, through its "foul word" function, searches for *Bastard Out of Carolina* and "The Owl and the Pussy Cat".

Moreover, a recent test conducted by the author revealed that popular filtering software such as CyberSitter and NetNanny block the author's homepage at <http://www.cyber-rights.org> for the simple reason that the word "pornography" is used on the homepage of Cyber-Rights & Cyber-Liberties. CyberSitter logs revealed that the pages were filtered and therefore not accessible because the software categorized the pages under the categories of *childporn*, *pedophile*, and *pornsex*. NetNanny's approach was no different. Other pages on the same

domain such as <http://www.cyber-rights.org/yamancv.htm> were, however, accessible. While CyberSitter provided no screen information when blocking <http://www.cyber-rights.org>, NetNanny displayed the following warning:




Similarly, both CyberSitter and NetNanny did not provide any search hits for the words "teenage pregnancy" through Google but both failed to block the Google Ads provided on the same pages with the same words.[38]

In this way, rather than useful software, "censorware" enters homes under the guise of "parental control" and as a purported alternative to government censorship. But in fact such systems impose the standards of software developers rather than leaving the freedom of choice and browsing to the consumers who buy and rely on such products. Most of the companies creating this kind of software provide no appeal

37 National Coalition Against Censorship, *Internet Filters: A Public Policy Research* (written by Marjorie Heins & Christina Cho, Free Expression Policy Project), Fall 2001, at <http://www.ncac.org/issues/internetfilters.html>

38 Note the Henry J. Kaiser Family Foundation report, *See No Evil: How Internet Filters Affect the Search for Online Health Information*, December 2002, at <http://www.kaisernetwork.org/health_cast/uploaded_files/Internet_Filtering_exec_summ.pdf>

system[39] to content providers who are "banned or blocked", thereby "subverting the self-regulating exchange of information that has been a hallmark of the Internet community."[40] So these tools should never be subject to government mandated usage, or endorsement.[41]

***Circumvention is Possible.*** Apart from the worrying defects explained above, circumvention of such tools is relatively easy. There is not only the often-cited example of children uninstalling or removing such software from their computers, but also a software exists called Circumventor, which beats the censors and makes any attempts to filter content seem futile. Circumventor was developed by Peacefire.Org's Bennett Haselton and bypasses any content blocking attempts, including those by the likes of CyberSitter and NetNanny.[42]

One of the main motivations behind developing Circumventor was Peacefire.Org's desire to bypass censorship of political websites. It is a well-known fact that almost all Internet users in China[43] and the Middle East[44] are blocked from accessing a considerable number of political websites. Technologies like Circumventor can help Internet users in censored countries to access such websites. In addition to Peacefire.Org's Circumventor, websites providing anonymous proxy services and anonymous web surfing, such as anonymizer.com, can also be used to bypass filtering. It is, however, often the case that the filters block such well-known websites and proxy servers. That is why Peacefire.Org's Circumventor, accessed through an unknown IP address (or known to a limited number of users), provides better success in circumvention and avoids possible unintended risks associated with circumvention technologies.[45]

***Adults' Rights vs. Children's Rights.*** Fifthly, while children's access is the most-cited excuse for the regulation of the Internet, this global medium is not only accessed and used by children. In fact, it is not possible for children to have their own Internet accounts without the involvement of a parent or another adult as in almost all countries you need to be over 18 to open an account with an Internet service provider. Adults should act responsibly towards children's Internet usage rather than relying on technical solutions that do not fully address Internet content-related problems. Librarians[46] and teachers should also have a role to play when Internet access is provided for children by public libraries and schools.

***Freedom of Expression & Censorship.*** Lastly, and more importantly, rating and filtering systems with blocking capabilities

39 Some companies provide a review mechanism and others allow their databases to be searched online. But in most cases an online content provider would not know if its web pages are blocked by filtering software unless that software is tested by the content provider. Considering the number of such software, to find out whether a certain software blocks a particular website and why is an impossible task.

40 See CPSR letter dated 18 December 1996 sent to Solid Oak, the makers of CyberSitter at <http://www.cpsr.org/cpsr/nii/cyber-rights/>

41 But a different approach was adopted in the USA. The Supreme Court held that Congress can give strong incentives to schools and libraries to use filtering software in *United States v. American Library Assn., Inc*, 539 US 194 (2003). According to the Supreme Court, Congress could also take steps to promote the development of filtering software by industry, and its use by parents.

42 For further information about PeaceFire.Org's Circumventor, see <http://www.peacefire.org/circumventor/simple-circumventor-instructions.html>

43 Note OpenNet Initiative report, Probing Chinese search engine filtering, August 2004, at <http://www.opennetinitiative.net/bulletins/005/>

44 See generally the Documentation of Internet Filtering Worldwide pages of the Berkman Center for Internet & Society, Harvard Law School, at <http://cyber.law.harvard.edu/filtering/>

45 See in detail the OpenNet Initiative report, *Unintended Risks and Consequences of Circumvention Technologies: The IBB's Anonymizer Service in Iran*, May 2004, at <http://www.opennetinitiative.net/advisories/001/>

46 Note E. Werby, The Cyber-Library: Legal and Policy Issues Facing Public Libraries in the High-Tech Era, National Coalition Against Censorship, 1999, at <http://www.ncac.org/issues/cyberlibrary.html>

allow repressive regimes to block Internet content (as mentioned above), or mandate the use of such tools.

> By requiring compliance with an existing rating system, a state could avoid the burdensome task of creating a new content classification system while defending the rating protocol as voluntarily created and approved by private industry.[47]

Such a concern on the part of civil libertarians remains legitimate in the light of the Australian Broadcasting Services Amendment (Online Services) Act which mandates blocking of Internet content based upon existing national film and video classification guidelines.[48] So there is governmental support for mandatory rating systems and this is an option that may be considered not only by repressive regimes but also by democratic societies.

Any regulatory action intended to protect a certain group of people, such as children, should not take the form of an unconditional and universal prohibition on using the Internet to distribute content that is freely available to adults in other media. The US Supreme Court stated in *Reno v. ACLU*,[49] that "the Internet is not as 'invasive' as radio or television" and confirmed the finding of the US Court of Appeal that "communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden." Still, filtering software were seen as preferable alternatives to government legislation at the Supreme Court level, and a similar line of argument was also raised at a later case in which the Supreme Court stated that "promoting filter use does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished."[50] It was argued that filters might well be more effective than certain legislation and impose selective restrictions on speech at the receiving end, not univer-

sal restrictions at the source. It was, however, acknowledged by the Supreme Court that "filtering software is not a perfect solution because it may block some materials not harmful to minors and fail to catch some that are."[51]

Problems associated with rating and filtering systems were also acknowledged at the European Union level. As the Economic and Social Committee of the European Commission pointed out in its report[52] on the European Commission's Action Plan on promoting safe use of the Internet, it is highly unlikely that the proposed measures will in the long term result in a safe Internet with the rating and classification of all information on the Internet being "impracticable".[53] More importantly, the Committee was worried that the possibility of Internet service providers using filtering and rating systems at the level of entry would render these systems, dubbed as "user empowering", an instrument of control, "actually taking choice out of citizens' hands." The Committee concluded that there is "little future in the active promotion of filtering systems based on rating."[54] But so far, promotion of such tools by the Internet

47 See the GILC Statement submitted to the Internet Content Summit, Munich, Germany, September 1999.

48 See generally <http://www.efa.org.au/Issues/Censor/cens1.html>

49 *Reno v. ACLU*, 117 S. Ct. 2329 (1997).

50 *Ashcroft, Attorney General v. American Civil Liberties Union et al*., certiorari to the United States Court of Appeals for the Third Circuit, No. 03–218. Argued 2 March 2004 – Decided 29 June 2004, at <http://supct.law.cornell.edu/supct/html/03-218.ZS.html>. See further *ACLU v. Reno II*, No. 99–1324. For the full decision see <http://pacer.ca3.uscourts.gov:8080/C:/InetPub/ftproot/Opinions/991324.TXT>.

51 Ibid.

52 Economic and Social Committee of the European Commission, Opinion on the Proposal for a Council Decision adopting a Multiannual Community Action Plan on promoting safe use of the Internet (OJEC, 98/C 214/08, Brussels-Luxembourg, 10 July 1998), 29–32.

53 Ibid. paragraph 4.1.

54 See ibid. See further Y. Akdeniz, "The Regulation of Internet Content in Europe: Governmental Control versus Self-Responsibility", (1999) *Swiss Political Science Review* 5(2), summer, 123–31.

industry and by regulators within Europe and elsewhere continues, and the conclusions of the Economic and Social Committee were largely ignored by the European Commission while finalizing the Action Plan on safer use of the Internet.

***Conclusion.*** This paper tried to provide an overview of self-regulatory initiatives that aim to tackle the problem of harmful Internet content. For both illegal and harmful Internet content, there is no unique solution for effective regulation; the emergence of "Internet governance" entails a more diverse and fragmented regulatory network that is not necessarily anchored primarily in nation-states.

The Internet is a great challenge for governance. Governance theorists are beginning to recognize that "objects of governance are only known through attempts to govern them"[55] and that "governance is not a choice between centralization and decentralization. It is about regulating relationships in complex systems."[56]

Therefore, a multilayered approach[57] is inevitable in which a mixture of public and private bodies will be involved in Internet governance, including individual Internet users for self-control as far as harmful Internet content is concerned. A multilayered approach will also go beyond the nation-state level to include layers at a supranational and international level of Internet governance. Yet at the same time, "if such mechanisms of international governance and re-regulation are to be initiated, then the role of nation states is pivotal."[58]

However, at a national level, it is now widely accepted that "government cannot simply regulate to achieve its aims in this new global electronic environment,"[59] and therefore a "light regulatory touch" is preferred in terms of the development of e-commerce. Although there has been much call for

a partnership between government and industry "to get the right balance" in order to build confidence and protect consumers in the information age, that balance should reflect and respect the rights of individual Internet users, an issue often not considered by the regulators and by the industry. To achieve such a balance, which takes into account individual rights as well as the interests of the business community, there is an urgent need for openness, accountability and transparency in relation to regulatory initiatives[60] aimed at Internet content at the national level, rather than knee jerk reactions to such media-hyped coverage of cases like the Gary Glitter case.[61]

At a supranational (for example within the European Union) or international level (for example within the United Nations),[62] more co-operation will be witnessed between various police forces for Internet-related criminal activity. Interpol holds

55 A. Hunt and G. Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994), 78.

56 R.A.W. Rhodes, "The Hollowing Out of the State: The Changing Nature of the Public Services in Britain", (1994) *Political Quarterly*, 138–51, p. 151.

57 Y. Akdeniz, "Governance of Pornography and Child Pornography on the Global Internet: A Multi-Layered Approach", in L. Edwards and C. Waelde (eds.), *Law and the Internet: Regulating Cyberspace* (Hart Publishing, 1997), 223–41.

58 P. Hirst and G. Thompson, "Globalization and the Future of the Nation State", *Economy and Society*, (1995) 24 (3), 408–42, p. 430.

59 Per Tony Blair, foreward to the Cabinet Office Report, e-commerce@its.best.uk, September 1999.

60 Note also the Cyber-Rights & Cyber-Liberties (UK) Response to Better Regulation Task Force Review of E-Commerce, 12 October 2000, at <http://www.cyber-rights.org/reports/brtf.htm>, and the Task Force's report, Regulating Cyberspace: better regulation for e-commerce, 14 December 2000, at <http://www.cabinet-office.gov.uk/regulation/taskforce/ecommerce/default.htm>

61 See "Fury as Glitter gets only 4 months", *The Sun*, 13 November 1999.

62 United Nations, Economic and Social Council, Commission on Human Rights, (Fifty-fourth session), Racism, Racial Discrimination, Xenophobia and Related Intolerance: Report of the expert seminar on the role of the Internet in the light of the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (Geneva, 10–14 November 1997), E/CN.4/1998/77/Add.2, 6 January 1998.

regular meetings for law enforcement agencies dealing with cybercrimes to stimulate further collaboration. Aligning national criminal laws "in general", however, does not seem to be a feasible option due to the moral, cultural, economic, and political differences between States. Some sort of consensus may be established in relation to specific crimes such as child pornography following the development of the Council of Europe's Cybercrime Convention.[63]

The current filtering technology does not respect legitimate differences between nation-states. In fact it does not even respect some basic human rights. The rights to freedom of expression and access to information are enshrined in the European Convention on Human Rights and other international human rights instruments, such as the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights. These core documents explicitly protect freedom of expression without regard to borders, a phrase especially pertinent to the global Internet.[64] The rating and filtering systems violate these freedom of expression guarantees.[65]

Blocking and filtering software is less restrictive than government regulation and censorship but other alternatives do exist. There should be more emphasis on promoting the Internet as a positive and beneficial medium and there is urgent need for awareness of Internet usage. Governments and regulators should invest more in educational and awareness campaigns rather than promoting ineffective rating and filtering tools which only create a false sense of security for parents and teachers, while children quickly manage to find any loopholes. The advice to be given to concerned users, and especially parents, would be to educate your children rather than placing your trust in technology or in an industry that believes it can do a better job of protecting children than parents. The message is to be responsible parents not censors.

63 See generally Y. Akdeniz, "An Advocacy Handbook for the Non-Governmental Organisations: The Council of Europe's Cyber-Crime Convention 2001 and the additional protocol on the criminalisation of acts of a racist or xenophobic nature committed through computer systems, Cyber-Rights & Cyber-Liberties", December 2003, at <http://www.cyber-rights.org/cybercrime/coe_handbook_crcl.pdf>

64 See further the GILC report, "Regardless Of Frontiers: Protecting The Human Right to Freedom of Expression on the Global Internet" (Washington DC: CDT, September 1998), at <http://www.gilc.org/speech/report/>

65 See the Global Internet Liberty Campaign Statement submitted to the Internet Content Summit, Munich, Germany, September 1999, at <http://www.gilc.org/speech/ratings/gilc-munich.html>